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IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

GEORGE STEVEN CORRIE

Plaintiff

vs.

DR. ROBERT L. CORRIE

Defendant

Approved by
District Court
Utah

David W. Slagle, of
SNOW, CHRISTENSEN & MARTINEZ
700 Continental Bank Building
Salt Lake City, Utah 84101

ATTORNEYS FOR RESPONDENT

IN THE SUPREME COURT OF THE
STATE OF UTAH

GEORGE STEVEN CONDIE,)	
)	
Plaintiff-Appellant,)	
)	
vs.)	Case No. 16646
)	
DR. ROBERT L. YOUNGBLOOD,)	
)	
Defendant-Respondent.)	

APPELLANT'S BRIEF

Appeal from an Order of the Third Judicial
District Court in and for Salt Lake County,
Utah, Honorable Homer F. Wilkinson, Judge.

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defendant's Motion to Dismiss and remand with instructions for the defendant to file a responsive pleading to plaintiff's Complaint.

STATEMENT OF FACTS

Plaintiff was injured in a motorcycle accident on August 7, 1974. He was hospitalized with the defendant and another doctor as treating physicians. During the course of the treatment, decubitus ulcers were developed by the plaintiff. Plaintiff continued after his release to be treated by defendant and continued having problems with the decubitus ulcers. In September, 1975, plaintiff was hospitalized by the defendant, and during the course of said hospitalization, it was discovered that plaintiff had developed osteomyelitis. Two years later as a result of the osteomyelitis, the plaintiff had his right leg amputated.

Plaintiff filed suit against the hospital and later against this defendant for the negligent diagnosis and treatment. Suit was filed against the hospital in October, 1975 and against this defendant on September 15, 1977. In the summer of 1978, the lawsuit was settled as against the hospital. Summons for the present Complaint was placed in the hands of the process server within three months of its filing. (See Affidavit of Don Hammill) Summons and Complaint were subsequently served on this defendant on September 14, 1978.

Plaintiff had been represented by two attorneys, who shortly after the service of the Summons and Complaint, had both withdrawn as counsel by sending notice to the Court, counsel for the defendant and plaintiff.

On January 12, 1979, respondent's attorney mailed to the appellant a notice requiring the appellant to appoint another attorney or to appear in person. Appellant received this notice and was in the process of contacting other lawyers. On February 1, 1979, respondent's attorney mailed a Notice of Hearing regarding his Motion to Dismiss to the appellant at the address listed on the Complaint and Summons. No other notice of said Motion was mailed to any other person. The appellant never received, nor did appellant have knowledge of said Notice, nor of the hearing date. (See Affidavit of Appellant) Said Notice was sent, certified, return receipt requested. The return was signed by an individual not the plaintiff. (See exhibit attached to Affidavit of respondent's attorney)

On February 13, 1979, hearing was held on respondent's Motion to Quash and/or Dismiss. Respondent appeared through counsel, and appellant neither appeared in person nor through counsel. At said hearing, the Judgment of Dismissal was granted. Counsel for the respondent then mailed a copy of the Judgment to the appellant, not by certified mail, but the appellant never received nor had notice of said entry of Judgment.

Appellant then obtained the services of his present attorney who, upon reading the Court file, discovered the Judgment of Dismissal and informed appellant of the same and moved to set aside the Judgment of Dismissal and filed supporting Affidavits signed by the appellant. Hearing was held on said Motion, and the Motion was denied by Judge Wilkinson by Order signed and dated

timely filed on August 27, 1979.

ARGUMENT

POINT I: THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING THE APPELLANT'S MOTION TO SET ASIDE THE JUDGMENT OF DISMISSAL.

Appellant urges three reasons why it was an abuse of discretion for the District Court to refuse to set aside the Judgment of Dismissal:

1. That the appellant never had notice of the hearing.
2. That the notice was improper.
3. That the defendant was not entitled to his Judgment of Dismissal.

The question of whether or not to grant relief or to otherwise set aside a Judgment, is largely a matter of discretion for the Trial Court. However, such discretion is not unbounded, and there is a policy in the law that disfavors the granting of Default Judgments. As stated in Mayhew v. Standard Gilsonite Company, 376 P.2d 951 at Page 952:

"It is undoubtedly correct that the trial court is endowed with considerable latitude of discretion in granting or denying such motions. However, it is also true that the court cannot act arbitrarily in that regard, but should be generally indulgent toward permitting full inquiry and knowledge of disputes so they can be settled advisedly and in conformity with law and justice. To clamp a judgment rigidly and irrevocably on a party without a hearing is obviously a hard and oppressive thing. It is fundamental in our system of justice that each party to a controversy should be afforded an opportunity to present his side of the case. For that reason it is quite uniformly regarded as an abuse of discretion to refuse to vacate a default judgment where there is reasonable justification or excuse for the defendant's failure to appear, and timely application is made to set it aside."

These principles have been continued to be upheld by this Court.
Cf. Heath v. Mower, 597 F.2d 855 (Utah, 1979).

In the case at bar, plaintiff has tendered a reasonable excuse of his non-appearance and failure to attend the hearing. As stated in his Affidavit, he was, during this period of time, attempting to obtain new counsel; that the address the notice was mailed to was that of his estranged wife; that in the month of January, he was not residing at the address, and that during February, he was hospitalized. It is also his sworn statement that he never received notice of the hearing. Further, defendant's attempt to insure personal receipt of the notice by certified mail rendered a receipt of the notice by some other individual than the plaintiff.

The statutes of the State of Utah have addressed themselves to the problems and procedures of withdrawal and substitution of counsel and proceedings after notice of withdrawal. As stated in 1953, U.C.A., §78-51-35, it states:

"When an attorney is changed as provided in the next preceding section [filing notice of withdrawal with the court], written notice of the change and substitution of a new attorney or of the appearance of the party in person must be given to the adverse party; until then he must recognize the former attorney."

It would appear that the above quoted section was passed in order to protect litigants of what transpired here. The statute dictates that until such time as the opposing litigant obtains a new attorney and the Court and parties are advised of that fact, or that he enters his appearance pro se indicating his willingness to represent himself, his opponents and attorney must still recognize

the former attorney as counsel of record and thus provide him with notice of any and all motions and hearings. This would insure that notice would be actually received and responded to and help enable the litigant whose attorney has withdrawn to state his need for more time or his position.

Although not dispositive, the Trial Court should look to the proposed defense or claim of the individual to determine if there is just cause for the setting aside of the Default Judgment. This was recognized in Mason v. Mason, 597 P.2d 1322 at Page 1323:

"Therefore, notwithstanding the rule of liberality in granting motions to set aside judgments in appropriate circumstances, that should not be done unless the moving party tenders the defense of sufficient merit to justify that procedure. This leads us to a consideration of the principal issue in this case: whether the defendant did tender a meritorious defense."

This issue is discussed in the following second point. It is there contended that as a matter of law, the defendant was not entitled to a Judgment of Dismissal, and that as a matter of law, those defenses should have been overruled. Such point is appropriate to this argument in that the plaintiff does have a meritorious response to the Motion to Dismiss of the defendant.

POINT II: THAT AS A MATTER OF LAW, THE DEFENDANT WAS NOT ENTITLED TO THE JUDGMENT OF DISMISSAL UPON THE GROUNDS URGED BY THE DEFENDANT.

The defendant in his Motion to Quash and/or Dismiss the plaintiff's Complaint, asserted four grounds which will be treated serially in this argument. Those grounds were: (1) improper service

of Summons and Complaint; (2) action is barred by the statute of limitations; (3) lack of due diligence; (4) lack of due diligence.

limitations, (3) failure to allege compliance with the Utah Health Care Malpractice Act, and (4) failure to obtain an attorney pursuant to local Court rules.

Defendant's first ground for dismissal was that the Summons and Complaint were not served in compliance with Rule 4 of the Utah Rules of Civil Procedure. This rule requires that Summons must issue upon a Complaint within three months from the date of filing of the Complaint, and that the Summons must, in any event, be served within one year after the filing of the Complaint, or the action will be dismissed. Affidavits were submitted prior to the hearing on the Motion to Dismiss which stated that the Summons and Complaint had been placed in the hands of a process server within three months of filing (See Affidavit of Don Hammill). Further the Affidavit of service recites that the Summons and Complaint were served on September 14, 1978 within one year of the filing of the Complaint. Thus, it would appear the service complied with the rules.

There was some argument made by counsel for the defendant at the hearing on the Motion to Set Aside Judgment that the Summons and Complaint served on the defendant were different than the Summons and Complaint which were filed initially. However, there is no evidence that in the material allegations or the prayer of the Complaint that there was any difference between the Complaints. Further, the rules provide, Utah Rules of Civil Procedure 4(h), that process or proof of service thereof may be amended unless it appears prejudicial. There being no material difference in the Complaint served upon the defendant, there cannot be any prejudice

to the defendant which would affect his substantial rights.

The second defense asserted by the defendant was that the action is barred by the statute of limitations. This defense is a factual defense based upon the circumstances of each individual case. The applicable statute containing the statute of limitations at the time of the acts complained of, was contained in 1953, U.C.A. §78-12-28 and allowed for a two year statute of limitations. This statute of limitations had been construed to mean that the statute of limitations does not begin to run until the plaintiff knew, or should have known, of the cause of action. Christiansen v. Rees, 436 P.2d 435 (Utah, 1969). Further, for any period of time the defendant is without the State of Utah, such period of time is not part of the time period for computation of the statute of limitations. 1953, U.C.A. §78-12-35.

The statute of limitations is an affirmative defense--one to be pleaded and proved by the defendant. It also requires a factual hearing and decision. In this case, there is an allegation of continuing negligence on the part of the defendant, and thus, the commencement period would be a question of fact. Also, any absence by the defendant would toll the statute. At the hearing, it was argued by counsel for the defendant that the statute of limitations began to run on September 6, 1975, the day the plaintiff entered the hospital, and that thus, the Complaint was filed nine days too late. Plaintiff objects to the unsupported conclusion that September 6, 1975 was the day the statute commenced to run, and further believes that evidence would demonstrate an absence of greater than nine days on the part of the defendant during the per-

Thus, it is the position of the plaintiff that dismissal based upon the state of the pleadings and the lack of evidence before the Court makes dismissal on the grounds of being barred by the statute of limitations improper at this time.

The third defense raised is the failure to allege compliance with the Utah Health Care Malpractice Act. It is the position of the plaintiff that the provisions of the Utah Health Care Malpractice Act do not apply to this case.

The actions of the defendant and injuries occurred are alleged to have happened during and prior to 1975. The Utah Health Care Malpractice Act became effective 60 days after adjournment of the Utah State Legislature on January 31, 1976. As such, it did not apply to this injury and cause of action. The defendant's concern is that the plaintiff did not file a Notice of Intention to Commence an Action, pursuant to the provisions of §78-14-8. The Act in its own terms would indicate that this section is not to be applied retroactively. The last section of the Act, §78-14-11 states:

"The provisions of this act, with the exception of the provisions relating to the limitation on the time for commencing an action, shall not apply to injuries, death or services rendered which occurred prior to the effective date of this act."

The limitation period set forth in the Health Care Malpractice Act is in section 78-14-4.

In Vealey v. Clegg, 579 P.2d 919 (Utah, 1978), this Court upheld the dismissal of a malpractice action for failure to give the required 90 day notice. Also in that case, the cause of action arose prior to the effective date of this Act. It is urged by this plaintiff that that case failed to take into account Section

11 of the Health Care Malpractice Act and failed to adequately ascertain the legislative intent with regard to the retroactivity of the statute.

As mentioned previously, that last section of the Act provides that the Act shall not be retroactive, except for the two year period of limitations for filing an action. After the decision in the Vealey case, the legislature amended Section 8 of the Health Care Malpractice Act by adding an an additional paragraph which stated:

"This section shall, for purposes of determining its retroactivity, not be construed as relating to the limitation on time for commencing any action, and shall apply only to causes of action arising on or after April 1, 1976."

Thus, the Utah Legislature overruled the decision in Vealey in a manner expressing that the legislative intent always was the notice of intention to commence the action does not bear upon the limitation of time in commencing an action, and thus, pursuant to the final section of the Act, is not to be held to be retroactive.

The last ground for dismissal alleged by the defendant was failure to obtain an attorney, pursuant to local Court rules and notice requiring appointment. This, by itself, is not sufficient to allow dismissal and survive a Motion to Set Aside Judgment. In Utah Oil Company v. Harris, 565 P.2d 1135 (Utah, 1977), the case was dismissed at the Trial Court level with prejudice for plaintiff's failure to appoint a new attorney and failure to diligently prosecute. The Supreme Court there reversed the dismissal.

In Utah Oil, supra, in arriving at the decision, the Court first quoted, 1953, U.C.A., §78-51-36, Notice to appoint successor, The Court then stated at Page 1136:

"The foregoing clearly appears to have been enacted to safeguard a litigant who finds himself without counsel and prevents further proceedings until he again has counsel or chooses to proceed pro se. It is not a 'court' directive nor does it exact any penalty against the litigant who fails for one reason or another to engage new counsel since, by its own terms, it affords him the 'alternative' of appearing in person. Consequently, when a litigant does fail to engage new counsel, that, in and of itself, is not an adequate basis to default him or to dismiss as against him with prejudice."

Local Court rule 2.5 also tracts the statute that is set forth in the discussion under Point I and states:

"When an attorney dies or is removed or suspended or withdraws from the case or ceases to act as an attorney, the party to an action for whom such attorney was acting, must before any further proceedings are had against him, be required by the adverse party, by written notice to appoint another attorney or to appear in person."

The thrust of the rule would appear to require either the appointment of another attorney or an appearance pro se before further hearings can be had. This, of course, would include the hearing here in question when the plaintiff did not appear, either personally or through counsel and Judgment was granted against him.

CONCLUSION

The state of the record, therefore, clearly demonstrates that it was an abuse of discretion by the Trial Court to not set aside the Judgment of Dismissal entered against the plaintiff. This, because of the timely application of the plaintiff after learning of the entry of the Order of Dismissal and the reasonable grounds and excuses which he gave for his failure to appear and defend the Motion

for Dismissal. This case should therefore, be remanded for District

Court, at a minimum for the Order of Dismissal to be set aside, and the plaintiff be granted an opportunity to fully answer and respond to the grounds alleged for dismissal.

It is also urged by the plaintiff-appellant that based upon the state of the record, it is clear that the defendant, as a matter of law, is not entitled to a Judgment of Dismissal of plaintiff's cause of action. Further, it is the position of the plaintiff that as a matter of law, the defendant's grounds for dismissal be overruled and found against him with prejudice.

Respectfully submitted this ____ day of November, 1979.

ROBERTS, BLACK & DIBBLEE

By

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I mailed a true and correct copy of the foregoing APPELLANT'S BRIEF to Mr. David W. Slage, Attorney for Defendant, 700 Continental Bank Building, Salt Lake City, Utah 84101, this ____ day of November, 1979.